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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,

Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
REASONS THE WRIT SHOULD BE DENIED	1
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Bidlack v. Wheelabrator Corp., No. 91-2378, slip op., 1993 U.S. App. Lexis 11509 (7th Cir. May 18, 1993) ..... *passim*

Boyer v. Douglas Components Corp., 986 F.2d 999 (6th Cir. 1993) 8

Gill v. Moco Thermal Industries, Inc., 981 F.2d 858 (6th Cir. 1992) 8

In re Morse Tool, Inc., 148 B.R. 97 (Bankr. D. Mass. 1992) 8

International Union, UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) 7, 8

Lister v. Stark, 890 F.2d 941 (7th Cir. 1989) 7

Litton Financial Printing Div'n v. NLRB, 111 S. Ct. 2215 (1991) 8

Merk v. Jewel Cos., 848 F.2d 761 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988) 5

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) 7

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) 7

Senn v. United Dominion Industries, Inc., 951 F.2d 806, *reh'g denied en banc*, 962 F.2d 655 (7th Cir. 1992) ..... *passim*

United Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987) 8

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REASONS THE WRIT SHOULD BE DENIED

The United States Court of Appeals for the Seventh Circuit granted hearing *en banc* in *Bidlack v. Wheelabrator Corp.*, No. 91-2378, in part to consider the question whether to overrule *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, *reh'g denied en banc*, 962 F.2d

655 (7th Cir. 1992) (its decision in this case[1]). The Petitioners in *Senn* asked this Court to withhold action on the Petition for Certiorari, pending the Court of Appeals's ruling in *Bidlack*, and, if the Seventh Circuit overruled *Senn*, to vacate its decision in *Senn* and remand it to the Seventh Circuit in light of *Bidlack*. (Petitioners' Supplemental Brief at 2.)

That will not be necessary. The Seventh Circuit just released its *en banc* decision in *Bidlack v. Wheelabrator*, No. 91-2378, slip op., 1993 U.S. App. Lexis 11509 (7th Cir. May 18, 1993). That court did *not* overrule *Senn*. Rather, seven of the ten judges (three signing Judge Posner's lead opinion, and the four dissenters) specifically endorsed the result and reasoning of *Senn*: its holding that extrinsic evidence cannot create an ambiguity in otherwise clear documents, its holding that silence is not ambiguity, and its holding that health and welfare benefits promised in collective bargaining agreements presumptively expire with those agreements. *Bidlack v. Wheelabrator*, slip op. at 6, 8-9 (Posner, J.), 26 (Easterbrook, J., dissenting).

The dividing lines between the three opinions in *Bidlack* aptly illustrate why this Court should not grant the Petition for Writ of Certiorari in this case. In *Bidlack*, slip op. at 6-8, Judge Posner's lead opinion (joined by Judges Flaum and Kanne) recognized three approaches to the issue whether welfare benefits provided retirees by a collective bargaining agreement vest for life on retirement:

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[1] Respondent United Dominion Industries, Inc. is a publicly held corporation traded on the New York, Montreal and Toronto Stock Exchanges. Respondent PST, Inc. is a subsidiary of United Dominion Industries, Inc. Respondent Pressed Steel Tank Co., Inc. is a privately held corporation with no parent or subsidiary corporations.

a "strong presumption" that such benefits expire with the agreement, unless the contract either uses the word "vest" or states unequivocally that benefits outlast the contract; a "weak presumption" that such benefits expire with the agreement, absent either an express vesting provision or ambiguous contract language that could reasonably be so construed; and a "parol substitution" rule, i.e., a rule that permits a retiree to use extrinsic evidence to add to the agreement a vesting term that does not appear in it. Under each of these approaches, the proponent of vesting (usually a retiree) retains the burden of proof. Judge Posner adopted the weak presumption against vesting: an approach consistent with traditional contract principles, and the rule actually applied in *Senn*. Judge Cudahy's opinion concurring in the judgment (joined by Judges Ripple and Rovner) recognized three additional possibilities—a strong presumption, a weak presumption, and a parol substitution rule in *favor* of vesting; in each case the former employer would bear the burden of proving there was *no* agreement to vest benefits on retirement. Judge Cudahy favored a weak presumption in favor of vesting. Judge Easterbrook's dissent (joined by Chief Judge Bauer and Judges Coffey and Manion) advocated a strong presumption against vesting.

The result in *Bidlack* was to reverse a summary judgment in favor of the employer on the retiree class's claim that it possessed vested "lifetime" health benefits. This result made Judge Easterbrook's opinion the dissent, but in its reasoning the plurality opinion. To summarize:

1. a majority of the court (7 of 10) required *some* presumption against vesting;
2. a majority of the court (7 of 10) specifically reaffirmed its decision in *Senn*, both its result and its reasoning; and

3. a plurality of the court (4 of 10) endorsed a *strong* presumption against vesting.

As earlier stated, the "weak presumption" that benefits do not vest, adopted by Judge Posner's opinion in *Bidlack*, follows traditional contract principles and is exactly the analysis followed in *Senn*. Both opinions start with the presumption that the entitlements provided by collective bargaining agreements expire when the agreements do. *Bidlack*, slip op. at 6; *Senn*, Pet. App. 17a-18a. Although extrinsic evidence may be used to explicate an ambiguous term of the agreement, *Bidlack*, slip op. at 8; *Senn*, Pet. App. 18a, extrinsic evidence is admissible only where there is actual contract language which is ambiguous, that is, which can reasonably be read two ways. *Ibid.* and *ibid.* Extrinsic evidence may *not* be used to add to a written agreement terms that are not in fact in the agreement. *Ibid.* and *ibid.* And contractual silence on the duration of retiree health benefits does *not* constitute an ambiguity and does *not* allow resort to extrinsic evidence. *Bidlack*, slip op. at 8-9; *Senn*, Pet. App. 21a. Jot for jot, Judge Posner's analysis in *Bidlack* follows the panel's analysis in *Senn*.

That is not what Petitioners would have this Court believe, and not what they told the Court in their Petition. They told the Court that the *Senn* "default rule" is the "strong presumption" favored by the plurality, dissenting opinion in *Bidlack*:

> a "default rule," that, in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, " 'entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification.' " [*Senn*,] 951 F.2d at 816.

Petition at 13.

But not so. This is what the Court of Appeals really wrote in this case:

> [I]n the absence of an agreement to the contrary, a company is not obligated to continue retiree welfare benefits after the expiration of the contract:
>
> "The entitlements established by collective bargaining agreements do not survive their expiration or modification."

Senn, Pet. App. 17a, *quoting Merk v. Jewel Cos.*, 848 F.2d 761, 763 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988). The court held an "agreement" was both necessary and sufficient, and said nothing about requiring a "clear and express statement"; Petitioners made that part up. The *Senn* panel did not adopt the strong presumption because it did not have to. Federal courts do not decide questions that are not squarely presented to them. The *Senn* panel did not have to choose between the strong and weak presumptions against vesting because, on the record in *Senn*, the court was compelled to hold that benefits did *not* vest under either approach. Indeed, on the record in this case—a record which includes:

- *no* provision for vesting or post-contract duration of retiree benefits;
- *no* ambiguous provision that could be interpreted that way;
- *no* extrinsic evidence of an agreement for vesting; and
- *express*, unambiguous provisions in the last two agreements that retiree health benefits would terminate when the collective bargaining agreement expired—

the court had no choice but to hold for the employer under *any* of the six approaches recognized by Judge Cudahy's concurring opinion in *Bidlack*—under any rule,

in fact, short of a statute requiring welfare benefits, like pension benefits, to vest as a matter of law.

There's the rub, the reason this Court should not grant the Petition in this case. Regardless which rule this Court might announce, its opinion will be advisory, because it will make no difference to the result in this case. There is no arguably-ambiguous contract language on which this Court can ground a discussion of the ambiguity issue. There is no extrinsic evidence in the record—no bargaining notes, no evidence that the parties negotiated a lifetime benefits agreement, no oral or written representation of lifetime benefits, no past practice, nothing but the Plaintiffs' subjective assumptions—which the Court can evaluate to determine whether, when, and to what extent extrinsic evidence should be used. The contract language in the last two agreements is too explicit for the allocation of the burden of proof to make any difference in the result. If the Court ever does take a retiree health benefits case—if the other two branches of government do not moot the issue entire before the Court's next Term ends—it should accept a case it can adjudicate. One in which its opinion will announce not just a rule of law, but a decision in the case.

A final word about Judge Cudahy's concurrence in *Bidlack v. Wheelabrator*. Although Judge Cudahy recognizes six conceivable approaches to the retiree benefits issue, that does not mean that the judicial circuits are split six ways—or split at all. The two opinions for reversal in *Bidlack*, which analyze and reject the strong presumptions, cite no decision that employs either one. The Petition in this case contends that no circuit, other than the Seventh Circuit in *Senn*, employs the strong presumption against vesting, but Petitioners have just been proven wrong

about that. Petition at 12-17; *cf. Bidlack*, slip op. at 6-7 (Posner, J.), 17-18 (Cudahy, J.). No court accepts either "parol substitution" rule: both because it would effectively destroy the very concept of a contract, *Bidlack*, slip op. at 7-8 (Posner, J.), and because it is specifically prohibited by ERISA.[2]

Every circuit follows the weak presumption of non-vesting—that is, the application of traditional contract principles, including the principle that the burden of proof (both of going forward and of persuasion) that a promise was included in a contract, lies with the party seeking to enforce the promise. The Sixth Circuit, with its "inference" proposed in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), may be an exception. Or perhaps not. Although most Courts of Appeals have rejected the *Yard-Man* "inference" outright, either expressly or implicitly, *see Bidlack*; Respondent's Brief in Opposition to Petition for Writ of Certiorari at 13-17, a more recent decision discounted the *Yard-Man* "inference" as nothing to get excited about—simply a tool the *Yard-Man* court used to confirm its resolution of already-sufficient plan language in the absence of extrinsic evidence. *In re*

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[2] "Every benefit plan shall be established and maintained pursuant to a written instrument." Employee Retirement Income Security Act of 1974 ("ERISA"), § 402(a)(1), 29 U.S.C. § 1102(a)(1). This provision is universally interpreted as a statute of frauds that prohibits parol modifications or additions to benefit plans. *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989); *Musto v. American General Life Ins. Co.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

Morse Tool, Inc., 148 B.R. 97, 146-147 (Bankr. D. Mass. 1992).[3]

If there ever was a split between the Sixth Circuit and the rest, that gap appears to be closing. The Sixth Circuit's most recent pronouncements either studiously ignored the *Yard-Man* "inference," *Gill v. Moco Thermal Industries, Inc.*, 981 F.2d 858 (6th Cir. 1992), or adverted to it and then declined to apply it, *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1003, 1004-5 (6th Cir. 1993) (an opinion written by Senior Judge Bailey Brown, a member of the *Yard-Man* panel). Respondents predicted in their Brief, filed last September, that the Sixth Circuit—prodded by this Court's decision and reasoning in *Litton Financial Printing Div'n v. NLRB*, 111 S. Ct. 2215 (1991)—would bring itself into line with all the other Circuits, and heal whatever conflict between the Circuits might once have obtained. That prediction may already have come to pass. And *Bidlack* will only help the healing along.

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[3] The *Morse Tool* court, 148 B.R. at 145, also expressly rejected Petitioners' contention (Petition at 16) that the First Circuit approved, or even considered, the *Yard-Man* "inference" in *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987).

CONCLUSION

Respondents respectfully pray this Court to DENY the Petition for Writ of Certiorari.

Respectfully submitted,

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